In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

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No. 79-1501

~~ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., AMERICAN ADVERTISING FEDERATION, AND TOY MANUFACTURERS OF AMERICA, INC.,~~ AND KELLOGG COMPANY, ~~INTERVENORS,~~

Petitioners,

— against —

FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK, CHAIRMAN, PAUL RAND DIXON, ELIZABETH HANFORD DOLE, DAVID A. CLANTON, AND ROBERT PITOFSKY, COMMISSIONERS,

Respondents.

PETITION OF KELLOGG COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION OF KELLOGG COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Kellogg Company prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 27, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced as Appendix A to this petition. The opinion, judgment and order of the District Court, reported at 460 F.Supp. 996, is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A separate statement of facts and law regarding mootness is found at the conclusion of this petition.

QUESTIONS PRESENTED

Two questions are presented by the judgment and opinion of the Court of Appeals:

1. Whether due process is satisfied when a Commissioner of the Federal Trade Commission who has publicly and privately expressed his views on factual issues central to a trade regulation rulemaking proceeding under Section 18 of the Federal Trade Commission Act can be "disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind" on such issues.

2. Whether Federal Trade Commission Chairman Michael Pertschuk, who has condemned advertisers who use "sophisticated techniques like fantasy and animation [to] manipulate children's attitudes," who has concluded that "the evidence confirms . . . that many children do not have the sophistication or experience" to understand advertising, and who has expressed "the conviction . . . that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional beliefs," should be disqualified from participating in the Children's Advertising trade regulation rulemaking proceeding, the purpose of which is to determine whether advertising to children is unfair or deceptive.

STATUTES

The statute involved in this case is Section 18 of the Federal Trade Commission Act, 15 U.S.C. Section 57a.

The pertinent parts of this statute are set forth in Appendix C to this petition.

STATEMENT OF THE CASE

A. Introduction and Proceedings Below

This case arises from the claim that Michael Pertschuk, the Chairman of the Federal Trade Commission ("FTC" or "Commission") should be disqualified from participating in the Commission's Children's Advertising trade regulation rulemaking proceeding because he has prejudged factual issues central to that proceeding. In a Petition for Recusal dated May 8, 1978, four trade associations[1] presented the Chairman with a number of his own statements which indicated his prejudgment, and requested that he recuse himself from the Children's Advertising proceeding. Receiving no response, the trade association moved the Commission to disqualify Chairman Pertschuk on May 18, 1978. On July 13, 1978, the Chairman responded to the May 8 petition and refused to recuse himself. On July 18, 1978, the Commission, without the participation of the Chairman or of Commissioner Pitofsky, who had previously recused himself, denied the May 18 motion.

The trade associations brought suit in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief. Petitioner Kellogg Company intervened as a plaintiff, seeking the same relief.[2] On November 3, 1978, the District Court (Gerhard A. Gesell, J.) acted upon the parties' cross motions for summary judgment. The court recognized that rulemaking proceedings commenced under Section 18 of the FTC Act,

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[1]Association of National Advertisers, American Association of Advertising Agencies, American Advertising Federation, and Toy Manufacturers of America.

[2]The trade associations are filing a separate petition with this Court for a writ of certiorari. Hereinafter, Kellogg Company and the trade associations will be referred to collectively as "petitioners."

such as the Children's Advertising proceeding, have significant adjudicative aspects, though they are "neither wholly legislative nor wholly adjudicative." (App. at B2) Thus, the court found it appropriate to apply the due process standard for disqualification of officials from administrative proceedings set forth in *Cinderella Career and Finishing Schools, Inc. v. FTC,* 425 F.2d 583 (D.C. Cir. 1970):

> "whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" 425 F.2d at 591, quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir), cert. denied, 361 U.S. 896 (1959)

The District Court determined that *Cinderella* required, "as a matter of fundamental due process," that the

> "final rulemaking decision . . . be premised on factual determinations which have not been prejudged in advance or tainted by the participation of one whose objectivity is subject to serious question." (App. at B3.)

Finding "a very substantial showing . . . that the Chairman has conclusively prejudged factual issues which will be disputed in the rulemaking proceeding and whose resolution will be necessary for a fair determination of the rulemaking as a whole" (App. at B3-B4), the District Court granted the declaratory relief requested by petitioners and enjoined the Chairman from further participation in the Children's Advertising proceeding.

The Commission appealed. Because the case involved an important issue of first impression—there had been no previous determination of the appropriate disqualification standard for prejudgment in any type of rulemaking pro-

ceeding—a number of amicus briefs were submitted.[3] On December 27, 1979, a divided panel[4] of the Court of Appeals for the District of Columbia Circuit reversed the District Court. The majority refused to apply the *Cinderella* standard to Section 18 proceedings. Instead, the majority of the Court of Appeals held that an administrative official can only be disqualified for prejudgment in a rulemaking proceeding upon "*a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.*" (App. at A3-A4; emphasis added.) The majority then applied this standard to trade regulation rulemaking proceedings conducted by the FTC, despite the fact that Congress has required significant additional procedural safeguards in such proceedings beyond the "notice and opportunity to comment" required in informal rulemaking under Section 4 of the Administrative Procedure Act (5 U.S.C. § 553). Finally, the majority employed this extreme standard to condone the most blatant case of prejudgment ever documented in federal administrative law.

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[3]The following amici urged affirmance of the District Court's opinion and judgment: Washington Legal Foundation, Great Plains Legal Foundation, Air Transport Association of America, and Grocery Manufacturers of America, Inc. Seven federal independent regulatory agencies joined in an amicus brief urging reversal. They are the Civil Aeronautics Board, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission.

[4]Judge Tamm wrote the 48 page majority opinion. Judge Leventhal (who died after writing his opinion but before the opinions were published) wrote a 14 page concurrence, arguing that the court should not exercise its jurisdiction over matters arising from an ongoing administrative proceeding, an argument considered and rejected by the District Court and the other panel members. Judge MacKinnon dissented sharply in a 37 page opinion.

B. The Children's Advertising Proceeding

On April 27, 1978, the Federal Trade Commission commenced the Children's Advertising trade regulation rulemaking proceeding by publishing an initial notice of proposed rulemaking in the Federal Register (Appendix D). This action was in response to petitions filed with the Commission in April of 1977 by two consumer groups—Action for Children's Television and Center for Science in the Public Interest. The proceeding, authorized under Section 18 of the FTC Act (15 U.S.C. § 57a), was designed to determine whether television advertising directed to or seen by children is an unfair or deceptive trade practice under Section 5 of that Act (15 U.S.C. § 45).

The initial notice of proposed rulemaking "invite[d] comment on the advisability and manner of implementation of a rule which would include the following three elements:

> (a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;
>
> (b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;
>
> (c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers." (App. at D9.)

To assist it in assessing the "advisability and manner of implementation" of this rule, the Commission also set

forth fifteen "general questions and issues of fact about which the Commission particularly desires comment. . ." (App. at D10) These fifteen issues encompassed the two major factual areas to be resolved in the Children's Advertising proceeding: the ability of children to understand the selling purpose of advertising, and the health effects, if any, of consumption of food products commonly advertised to children. Because these factual issues were to be explored in the context of a trade regulation rulemaking proceeding pursuant to Section 18 of the FTC Act, all participants in the proceeding were guaranteed the right to make oral presentations, to conduct or have conducted cross-examination on disputed issues of material fact, and to present oral and written rebuttal on such disputed issues. Further, Section 18 requires that any rule promulgated by the Commission be supported by substantial evidence in the rulemaking record taken as a whole.

C. The Evidence Of The Chairman's Prejudgment

Petitioners presented to Chairman Pertschuk and the District Court abundant evidence of the Chairman's strongly held preconceptions about the factual issues central to the Children's Advertising proceeding—preconceptions which, petitioners argued, would render the procedural safeguards of Section 18 a meaningless ritual. The evidence consisted of eleven letters, speeches, and interviews written, delivered, or published between June, 1977, and January, 1978.[5] They are described generally in Judge Tamm's majority opinion (App. at A39-A47) and in detail in Judge MacKinnon's dissenting opinion (App. at A77-A87) of the court below.

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[5]This evidence may be found in the Joint Appendix ("J.A.") submitted to the court below. (J.A. at 28-50, 71-73, 95). One item, the speech given before the Action for Children's Television Research Conference, is reprinted for this Court at Appendix E.

Petitioners argued that the evidence clearly showed that the Chairman had prejudged key factual issues upon which the Commission subsequently was to solicit comments in the Children's Advertising proceeding. Additionally, the Chairman's statements indicated that he had reached a firm conclusion about the ultimate issue in the proceeding: whether children's advertising is unfair or deceptive under Section 5. The uncontroverted evidence presented to the District Court contains numerous examples of both the Chairman's prejudgment of facts and his prejudgment of that ultimate issue. For instance, the first of the fifteen "issues of fact" pinpointed by the Federal Register notice of April 27, 1978, asked:

> "Is there a specific age below which significant numbers of children are unable to understand the selling purpose of, or are otherwise unable to comprehend or evaluate, advertising? If so, what is that age? (App. at D10.)

The Chairman had already answered this question on October 31, 1977, in an interview on the *Today Show,* when he stated:

> "I have some serious doubt as to whether any television advertising should be directed at a three or four or five year old, a preschooler. They're not competent to understand the nature of the message." (J.A. at 31.)

He reiterated his judgment about the ability of young children to comprehend advertising eight days later in a speech given on November 8, 1977, to Action for Children's Television ("ACT"), one of the consumer groups originally petitioning for rulemaking.

> "the evidence confirms . . . that many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming." (App. at E3.)

Further, the Chairman expressed his opinion that even a clear indication of the purpose of television commercials would be insufficient to overcome the child's lack of understanding.

> "Even if a disclosure were made of the commercial nature of the message, the youngest of children simply would not understand." (*Id.*)

Petitioners contended that the ACT speech in particular contained numerous illustrations of how, long before the Children's Advertising proceeding began, the Chairman had reached personal beliefs and judgments about the factual issues to be explored in that proceeding. In fact, the ACT speech often seemed to parallel the initial notice of proposed rulemaking. In the initial notice the Commission sought to explore how different attributes of foods containing sucrose affected the likelihood that consumption of those foods would cause tooth decay. Thus, in Question 7 the Commission asked:

> "What factors affect the cariogenicity of sucrose and what are their relative magnitudes?" (App. at D12.)

The Chairman had anticipated this issue of fact in the ACT speech when he noted:

> ". . . advertising often fails to disclose specific material risks. Of imminent concern, of course, is the conclusion of many experts that sugar, especially sticky sugar, is the preeminent cause of tooth decay." (App. at E6-E7.)

The Chairman then went on to express his own views on other factual questions subsequently pinpointed for comment in the initial notice of proposed rulemaking. Question 9 of the initial notice, which asked:

> "What evidence is there that sugar consumption contributes to or acts as a potentiating factor with respect

> to non-dental health or nutrition-related problems, whether in childhood or in later life?" (App. at D13.)

had already been answered unequivocally by the Chairman:

> "Moreover, children have become the target market for products that promise immediate satisfaction. With food, this often means instant pleasure—*and the danger of long term malnutrition.* Children lack the judgment and experience to see that something that looks good to them in the short run can hurt them in the long run. They cannot protect themselves against adults who exploit their presentmindedness." (App. at E6, emphasis added.)

The Chairman also noted that "experts find sugar to be linked to the national epidemic of obesity." (App. at E7.)

The Chairman also left no doubt as to his views on Question 10:

> "What is the nature and extent of the awareness of children at various ages of the impact on their dental health or nutrition of consumption of sugared products? . . . . What is the impact of advertising of sugared products on that awareness?" (App. at D13.)

He succinctly stated:

> "Cumulatively, commercials directed to children tend to distort the rule of food. 'Consumer, stuff thyself' is the message." (App. at E6.)

The views which the Chairman expressed in his speech to ACT were not limited to factual issues central to the Children's Advertising proceeding. He also made clear his views on the ultimate issues involved in the proceeding. His speech was dotted with pithy statements and rhetorical questions which left no doubt as to what his position would be when called upon to determine whether children's advertising was unfair or deceptive within the meaning of Section 5 of the FTC Act.

"Advertisers seize on the child's trust and exploit it as a weakness for their gain." (App. at E3.)

• • • •

"If there is one salient public policy which rises commandingly from centuries of common and statutory law, it is that the commercial exploitation of children is repugnant to a civilized society." (App. at E4-E5.)

• • • •

"Shouldn't society apply the law's strictures against commercial exploitation of children, and the law's solicitude for the health of children to ads that threaten to cause imminent harm—harm which ranges from increasing tooth decay and malnutrition to injecting unconscionable stress into the parent-child relationship?" (App. at E7.)

• • • •

"In short, why isn't such advertising unfair within the meaning of the Federal Trade Commission Act and, hence, unlawful?" (App. at E6; emphasis added.)

The day after his speech to ACT the Chairman sent copies of the speech with brief cover memos to various individuals. In one of those cover memos, sent to Coleman McCarthy, a Washington newspaper columnist, the Chairman wrote:

"Coleman, I know you share my concern in raising public consciousness to the part we play as a society for *permitting children to be made commercial objects.* I thought you'd want to see this statement in which I've tried to establish underpinings [sic] for a *fundamental assault* on television advertising directed toward young children." (J.A. at 71; emphasis added.)

Finally, Chairman Pertschuk sent the following letter to Donald Kennedy, the Commissioner of the Food and Drug Administration. This private correspondence between high-ranking administrative officials, charged with the re-

sponsible implementation of public policy based on proper balancing of competing interests, speaks for itself:

"November 17, 1977

Honorable Donald Kennedy
Food and Drug Administration
Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20852

Dear Don:

Setting legal theory aside, the truth is that we've been drawn into this issue because of *the conviction,* which I know you share, *that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional values. I see, at this point, our logical process as follows: children's advertising is inherently unfair.* As a policy planning agency we have to make judgments as to our priorities. The first area in which we choose to act is an area in which a substantial controversy exists as to the health consequences of encouraging consumption of sugared products (not just cereals). With this formulation we do not have to prove the health consequences of sugared cereals. What we do have to prove is that there is a substantial health controversy regarding the health consequences of sugar—a much lower burden of proof.

I'm *convinced* that the convergence of public policies regarding the commercial exploitation of children with the health controversy over sugared products give us a stronger base and frankly deal directly with the underlying concerns which prompt our action.

Sincerely yours,
Michael Pertschuk"

(J.A. at 95; emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents an issue of first impression that has far-reaching consequences for individuals and businesses subject to Federal Trade Commission rulemaking proceedings under Section 18 of the FTC Act. Five years ago, in enacting the Federal Trade Commission Improvement Act (Pub. L. No. 93-637, January 4, 1975), Congress established an entirely new form of rulemaking proceeding for the FTC by adding Section 18 to the FTC Act. In this petition, this Court is asked to determine the conditions under which an FTC Commissioner should be disqualified from participating in a Section 18 proceedings due to personal prejudgment of factual issues involved in the proceeding. In the course of making that determination, this Court will be required to undertake its first in-depth examination of the nature and purpose of a statute which has already had a significant impact on American businesses and consumers.[6]

The particular issue to be decided in this case—the proper disqualification standard to be applied in a Section 18 proceeding—is based on the due process right to a fair and impartial decisionmaker in an administrative proceeding. That right, in turn, depends on the nature of the administrative proceeding in question. Thus, the proper standard for disqualification of Commissioners from Section 18 proceedings turns on the particular statutory framework for Commission rulemaking mandated by Congress in Section 18.

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[6]During Section 18's five-year history four rules have been promulgated and fifteen proceedings are pending. *See* 4 *CCH Trade Regulation Reporter*, ¶¶ 38,001, 38,002 (1980). The two final rules which have been subjected to judicial review have both been remanded to the Commission for further proceedings. *Katharine Gibbs School (Inc.) v. FTC*, 1980-1 CCH Trade Cas. ¶ 63,077 (2d Cir. 1979) (vocational schools rule); *American Optometric Association v. FTC*, 1980-1 CCH Trade Cas. ¶ 63,165 (D.C. Cir. 1980) (ophthalmic goods and services rule).

The court below set forth a standard which would allow a Commissioner to participate in a Section 18 proceeding absent "a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking." This standard, which effectively insulates an FTC Commissioner from prejudgment disqualification in virtually all situations, flies in the face of the rigorous fact-testing and judicial review requirements imposed upon the Commission by Congress in Section 18. The decision of the Court of Appeals vitiates these Congressional checks on the Commission's broad rulemaking powers and destroys the delicate balance between efficiency and fairness Congress sought to establish in Section 18.

In addition to distorting the fundamental nature of Section 18 proceedings, the decision of the Court of Appeals sets forth a prejudgment standard which, when applied, confers virtual immunity to biased administrative officials. If unreviewed, this first attempt by a federal court to impose a prejudgment disqualification standard on rulemaking proceedings will assure that prejudgment disqualification is written out of such proceedings, in derogation of fundamental principles of due process and fairness in administrative decisionmaking. Thus, the decision of the court below will have an enormous adverse impact on both Section 18 rulemaking proceedings and the entire range of rulemaking activities conducted by agencies of the federal government. For these reasons this Court should issue a writ of certiorari to review the decision of the court below.

I

THIS COURT SHOULD DECIDE THE EXTENT TO WHICH DUE PROCESS REQUIRES A FAIR AND IMPARTIAL DECISIONMAKER IN A PROCEEDING UNDER SECTION 18 OF THE FTC ACT

A. The Court Below Failed to Recognize That Congress Struck a Balance in Section 18 Between Administrative Efficiency and Fairness to Participants

This Court is called upon to decide the nature of an acknowledged due process right—the right to an impartial decisionmaker—that is not specifically prescribed by the statute which establishes the decisionmaking process. Nevertheless, the nature of the decisionmaking process is the essential element upon which that due process right depends. The court below erred by merely characterizing Section 18 proceedings as rulemaking and by refusing to recognize the underlying Congressional purpose of guaranteeing a fair opportunity to participate meaningfully in Section 18 proceedings. That purpose is evident from a consideration of the legislative history of Section 18.

On June 27, 1973, the Court of Appeals for the District of Columbia Circuit held that the Federal Trade Commission, under Section 6(g) of the FTC Act (15 U.S.C. § 46(g)) had the power to issue substantive rules to implement its authority under Section 5 of the Act to regulate "unfair acts or practices in commerce." *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). The Court of Appeals further held that the promulgation of these rules was subject only to the notice and comment requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. § 553). Certiorari was denied by this Court on February 25, 1974. 415 U.S. 951.

Less than eleven months later, on January 4, 1975, the Federal Trade Commission Improvement Act was signed

into law as Public Law No. 93-637. The FTC Improvement Act added a new Section 18 to the FTC Act which substantially altered the informal nature of the trade regulation rulemaking procedures which had been enunciated in the *National Petroleum Refiners* case. The impetus for such action was clear. Congress was concerned that individuals and businesses subject to the Commission's expansive statutory authority would not receive an adequate opportunity to participate in Commission decisions under the informal procedures approved in the *National Petroleum Refiners* case. The House Committee on Interstate and Foreign Commerce, in reporting out the immediate predecessor to Section 18, branded the notice and comment requirements and the loose "arbitrary or capricious" review standard of informal rulemaking as "inadequate for proceedings in which the integrity of the proposed rule may rest on the resolution of issues of material fact." H.R.Rep. No. 93-1107, 93d Cong., 2d Sess. 33 (1974). The Committee explicitly stated:

> "Because of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices', the committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described below which we believe to be more appropriate in this context than merely relying upon the provisions of sections 553 and 706 of title 5." *Id.* at 45-46.

Thus, a number of procedural safeguards were added by Congress in Section 18 to the notice and opportunity to comment required by Section 4 of the APA and the *National Petroleum Refiners* case. The statute was, and still remains, the preeminent example of "hybrid" rulemaking—adding significant adjudicative features to informal rulemaking procedures. Interested persons are given the op-

portunity to make oral presentations as well as submit written comments. 15 U.S.C. § 57a(c)(1)(A). Participants are also allowed to cross-examine witnesses and present rebuttal submissions on disputed issues of material fact that are necessary to resolve before promulgating a rule. 15 U.S.C. § 57a(c)(1)(B). Further, the Court of Appeals, when reviewing a final rule promulgated under Section 18, is required to overturn any rule in which the denial or limitation of an interested person's right to engage in cross-examination or make rebuttal submissions "has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole." 15 U.S.C. § 57a(e)(3)(B).

In addition to establishing procedures which insure that the Commission will elicit facts central to its proposed rules, Congress also sought to guarantee that the Commission would rely on its fact-testing process in deciding whether a rule should issue. Thus, in Section 18 Congress required that the reviewing court shall hold unlawful and set aside any rule "not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 57a(e)(3)(A).

On the other hand, concern was expressed that overly formal procedures would unduly hamper the efficiency of Commission proceedings. *See* H.R. Rep. No. 93-1606, 93d Cong., 2d Sess. 33 (1974). Thus, the Commission was given authority to limit cross-examination and rebuttal submissions "to avoid unnecessary costs or delay." 15 U.S.C. § 57a(c)(2). However, Congress cautioned that such limitations must be "consistent with the overall requirement of fairness in the legislation." H.R. Rep. No. 93-1606, *supra*, at 33. In sum, Congress sought a balance in Section 18 between administrative efficiency and fair and meaningful participation by those affected by Commission rules.

The majority of the court below, while paying lip service to the statutory safeguards required by Congress in Section 18, totally refused to recognize the basic purpose behind those safeguards. Although it recited the fact-testing and review requirements of Section 18 (App. at A31, n. 35), the majority focused solely on the fact that Section 18 is a rulemaking proceeding, not an adjudication. It never looked beyond that superficial distinction. In so doing, the majority went so far as to analogize the Commission's carefully circumscribed authority under Section 18 to Congress's unfettered legislative powers (App. at A27-A28), despite the obvious fundamental differences between legislatures and administrative agencies, as discussed by the dissent (App. at A87-A91). It is this distortion by the majority of the Congressional purpose expressed in Section 18 which led to the extreme disqualification standard developed in this case.

B. The Court Below, in Devising Its "Unalterably Closed Mind" Standard for Actual Personal Prejudgment in Section 18 Proceedings, Misconstrued Decisions of This Court Which Involved Disqualification Claims Based Solely on the Combination of Administrative Functions

The court below created a new disqualification standard for actual personal prejudgment of factual issues in Section 18 proceedings. It held that "[a]n agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking." (App. at A3-A4.) In devising this standard, the majority of the court below borrowed from the language of two decisions of this Court, *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482 (1976), and *FTC v. Cement Institute,* 333 U.S. 683 (1948) (App. at A37-A38). The

majority's use of these two decisions to buttress its "unalterably closed mind" standard exhibits a lack of understanding of the nature of the case presented against Chairman Pertschuk and, if unreviewed, will extend the application of the *Hortonville* case and the *Cement Institute* case to situations wholly different from those before this Court in those cases.

Simply put, the *Hortonville* and *Cement Institute* cases involved situations in which administrative bodies, required to perform two types of functions, were charged with disqualifying bias in one function solely because they had performed the other required function. In other words, the disqualification claims arose solely from the combination of administrative functions. In the *Hortonville* case, a school board was responsible for negotiating contracts with the teachers of the school district. After negotiations broke down and the teachers went on strike in violation of state law, the board exercised its exclusive power to dismiss the teachers. This Court held that the board could exercise both statutory duties—to negotiate with and to dismiss teachers—in accord with due process. However, this Court clearly limited the application of its decision. It stressed that no claim was presented that Board members were personally biased against the teachers. 426 U.S. at 491-92. Thus, the sole issue before the Court was whether the Board's performance of one statutory duty precluded it from performing another statutorily-required function. *Id.* at 492-93. *See also Withrow v. Larkin,* 421 U.S. 35, 50 n. 16 (1975).

In the *Cement Institute* case, the claim was made that the FTC should be disqualified from passing upon issues involved in an adjudicative proceeding against the basing point pricing system utilized by the cement industry because the Commission had previously reported to Congress that such a system was illegal. This Court noted that the

Commission was obligated to obey Congressional requests to investigate and report on particular matters. *Id.* at 701. Thus, as in the *Hortonville* case, the respondents would have required that the performance of one statutory duty barred the Commission from exercising another obligatory function. *Id.* at 702. Further, as in the *Hortonville* case, if the Commission were thereby precluded from adjudicating the legality of the basing point pricing system, no other governmental agency could undertake such action. *Id.* at 701. It is little wonder then that this Court would not disqualify the entire Commission in the *Cement Institute* case absent a showing that "the minds of its members were irrevocably closed on the subject of the respondents' basing point practices." *Id.*

The present case is wholly different from the *Hortonville* case and the *Cement Institute* case. Chairman Pertschuk's disqualification is sought because of his actual personal prejudgment of factual issues in the Children's Advertising proceeding. No contention is made that Chairman Pertschuk should be disqualified merely because of his participation in another statutorily-mandated function. The majority suggests that the Commission was required to form preliminary conclusions before issuing the initial notice of proposed rulemaking (App. at A38). In addition, the majority points to the requirement that commissioners remain free to discuss important policy issues (App. at A34). However, neither of these functions required the Chairman to take the forceful, unrelenting position that "children's advertising is inherently unfair." (Letter to Donald Kennedy, J.A. at 95.) No other Commissioner, charged with the same duties as the Chairman, exhibited such actual personal prejudgment. By misreading this Court's decisions in *Hortonville* and *Cement Institute*, the majority has created a standard for prejudgment disqualification uniquely unsuited to Section 18 proceedings.

C. Application of the Disqualification Standard Adopted By the Court Below Would Negate Congress's Efforts to Insure Fair and Meaningful Participation in Section 18 Proceedings and Would Add Nothing to the Efficiency of Such Proceedings

Application of the disqualification standard set forth by the court below will destroy the delicate balance created by Congress. By allowing a Commissioner to participate in a Section 18 proceeding absent a "clear and convincing showing of an unalterably closed mind," the majority would permit the participation of a Commissioner who has fixed views on the ultimate issues to be determined in the proceeding and equally rigid views on the factual issues whose resolution may be necessary in reaching that ultimate conclusion. The only showing a Commissioner need make to avoid disqualification is that he or she might possibly be swayed by overwhelming evidence or particularly compelling lines of cross-examination—that the Commissioner's prejudgment, while firm, is not "unalterable."

With such a Commissioner participating in a trade regulation rulemaking proceeding, the right to engage in cross-examination and submit rebuttal evidence on disputed issues of material fact which are necessary to resolve becomes a hollow right, if a right at all. In fact, the most drastic effect will occur in situations such as the Children's Advertising proceeding itself, with its specially devised two-hearing process.[7] The burden faced by a participant

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[7] In the first stage, termed the "legislative" hearing, any interested person may appear and make an oral presentation on any aspect of the rule. No cross-examination is permitted at the "legislative" hearing. The second round of hearings will take place only if the Commission determines that there remain disputed issues of material fact that are necessary to resolve. In that case, recall and cross-examination of relevant witnesses and presentation of rebuttal witnesses will be permitted. (App. at D15-D21.)

In other words, the "disputed issues" hearing is a limited adjudicative-type hearing. However, a Commissioner who has precon-

who confronts a predisposed Commissioner is completely inconsistent with "Congress's particular concern for the accuracy of fact-finding . . ." in Section 18 proceedings. *American Optometric Association v. FTC,* 1980-1 CCH Trade Cas. ¶ 63,165 at 77,801 (D.C. Cir. 1980).

Likewise, the requirement that a reviewing court strike down rules promulgated under Section 18 unless they are "supported by substantial evidence on the rulemaking record . . . taken as a whole" is imperiled by the disqualification standard embraced by the majority of the court below. Unlike purely informal rulemaking, which requires only that the agency determination not be arbitrary or capricious, the factual basis of rules promulgated under Section 18 must be supported by record evidence. See *American Optometric Association v. FTC, supra*; *Katharine Gibbs School (Inc.) v. FTC,* 1980-1 CCH Trade Cas. ¶¶ 63,077 at 77,343 (2d Cir. 1979). If a decisionmaker is allowed to prejudge central factual issues based on extrarecord prejudices, reasoned decisionmaking—the purpose of the substantial evidence review standard—will fall by the wayside, as will the "integrity" of the trade regulation rulemaking process, a goal specifically sought in the development of Section 18. H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 33 (1974).

Beyond directly contradicting Congress's expressed concern for fairness in Section 18 proceedings, the "unalterably closed mind" standard in no way contributes to the efficiency of the administrative process. Unlike restrictions on cross-examination and rebuttal, an unrestrictive prejudgment standard neither avoids undue delay nor limits

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ceived impressions on factual and ultimate issues may well conclude that there are no disputed issues of material facts necessary to resolve and that no "disputed issues" hearing is appropriate. In such a case, the right of interested persons to engage in cross-examination may be foreclosed absolutely, as well as practically, by the participation of a biased Commissioner.

irrelevant information. In short, the majority's disqualification standard imposes great costs on Section 18 but offers no benefit whatsoever.

D. The Court Below, in Refusing to Apply the Standard for Prejudgment Disqualification Established for Commission Adjudicative Proceedings, Ignored the Similarities Between Section 18 Rulemaking and Commission Adjudication

The standard for prejudgment disqualification in Section 18 proceedings proposed by petitioners, accepted by the District Court, but rejected by the majority of the Court of Appeals is the disqualification standard set forth in *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

> "The test for disqualification [is] . . . whether 'a disinterested observer may conclude that [the Commissioner] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

The majority of the court below refused to apply the *Cinderella* standard to the evidence of Chairman Pertschuk's prejudgment because the *Cinderella* standard was developed in an adjudicatory proceeding before the Commission and not a hybrid rulemaking proceeding under Section 18. Instead, the majority relied on the presumption that rules promulgated in Section 18 proceedings have industry-wide applicability, while Commission adjudicative proceedings only determine the rights of parties to the proceeding.

> "A section 18 proceeding is directed to all members of an affected industry and is based on legislative fact. Even when evidentiary procedures are employed in the formulation of specific fact, the product of

those procedures is 'used in the formulation of a basically legislative-type judgment.' [*United States v. Florida East Coast Railway*, 410 U.S. 224, 246 (1973)]. Although we recognize that the line between rulemaking and adjudication 'may not always be a bright one,' *Id.* at 245, we have no doubt that section 18 proceedings fall clearly on the rulemaking side of the 'recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules . . . on one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.' *Id.*" (App. at A26-A27.)

The majority concluded "we never intended the *Cinderella* rule to apply to a rulemaking procedure such as the one under review." (App. at A33.)[8]

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[8]Judge Tamm, the author of the majority opinion of the court below, was also the author of the *Cinderella* opinion. However, Judge MacKinnon, dissenting from Judge Tamm's opinion below, was also on the *Cinderella* panel. He expressed a very different view.

"The next assertion, by the author of the *Cinderella* opinion, is that '*we* never intended the *Cinderella* rule to apply to a rulemaking procedure such as the one under review.' (Emphasis added). So far as the other judges of the division of the Court that decided the *Cinderella* case are concerned, I believe this is an overstatement. *We* never expressed any opinion as to the application of our ruling in *Cinderella* to a Magnuson-Moss rulemaking proceeding. That issue was not involved in the case. We never concluded that the same principle did, or did not, apply to such proceedings. We applied the rule to disqualify the Chairman in *Cinderella*, a case involving an *adjudication*, because the parties had a right to a fair decisionmaker. Since, as the majority admits, a fair decisionmaker also is required here in the promulgation of substantive rules establishing specific unfair and deceptive acts and practices, no reason exists why the same rule should not be applied to this case in order to assure fair decisionmakers. How else could fair decisionmakers be obtained?" (App. at A92-A93; emphasis in original.)

Judge MacKinnon went on to develop an intermediate standard for disqualification in Section 18 proceedings.

"[T]he moving party must show by a preponderance of the evidence that the decisionmaker could not participate fairly in the formulation of the rule because of substantial bias or pre-

As previously discussed, the majority's rejection of the *Cinderella* standard disregards the emphasis on fairness imposed on the Commission by Congress through the fact-finding and review requirements of Section 18. Additionally, the majority completely ignores the impact of a Commission adjudicative proceeding on members of an industry who are not party to the adjudicative proceeding but whose acts or practices might be called into question during the course of the adjudication. At the same time that it enacted Section 18, Congress granted to the Commission the power to enforce adjudicative cease and desist orders against individuals and companies not party to the adjudication. 15 U.S.C. § 45(m)(1)(B). Under this provision, a non-party may be held liable under Section 5 of the FTC Act merely upon a determination that it engaged in the acts or practices described in the cease and desist order, and that it knew that those acts or practices were illegal. Thus, the difference in impact between Commission rulemaking and Commission adjudication, which lay at the heart of the majority's rejection of the *Cinderella* standard, is virtually nonexistent.

In fact, every reason exists to apply the *Cinderella* standard to Section 18 proceedings. The standard was developed to censure actions "which give the appearance that [a Commissioner] has already prejudged the case *and that the ultimate determination of the merits will move in predestined grooves.*" *Cinderella Career and Finishing Schools, Inc. v. FTC, supra,* 425 F.2d at 590 (emphasis added). If such prejudgment were allowed, the procedural rights of a party to an adjudication (such as cross-examination and rebuttal) would be empty shells. The same is true for rulemaking under Section 18, particularly

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judgment on any critical fact that must be resolved in such formulation." (App. at A99.)

Judge MacKinnon would have disqualified Chairman Pertschuk under this standard.

in the Children's Advertising proceeding, of which another court has already observed

> "one gets the impression that the proceeding itself is window dressing for the benefit of a court passing on a final trade regulation rule that was in stock long before its tentative models were displayed in the children's advertising Notice." *Association of National Advertisers, Inc. v. FTC,* 1979-2 CCH Trade Cas. ¶ 62,950 at 79,398 (D.C. Cir. 1979).

Likewise, prejudgment in adjudicative proceedings has been deemed unacceptable because it

> "may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so *after consideration of the record." Cinderella Career and Finishing Schools, Inc. v. FTC, supra,* 425 F.2d at 590; emphasis added.

This basic incompatibility between factual prejudgment and reliance on record evidence is well-established.

> "There can be no doubt that courts have insisted and will insist on absence of partiality or even the appearance of it by those exercising quasi-judicial functions, or authorized to form conclusions of fact or law upon written records." *Starr v. FAA,* 589 F.2d 307, 315 (7th Cir. 1978).

As discussed, Section 18 requires just such a written record. The factors which led to the development of the *Cinderella* standard for Commission adjudicative proceedings—the need for an open-minded scrutiny of the facts developed during the proceeding and the need to substantiate any decision with record evidence—are present in Section 18 proceedings as well. The decision of the court below disregards these basic facts and should be reversed.

II

THE DECISION OF THE COURT BELOW, IF NOT REVERSED, WILL VIRTUALLY PRECLUDE THE DISQUALIFICATION OF ANY FEDERAL ADMINISTRATIVE OFFICIAL FROM ANY RULEMAKING PROCEEDING

A. The "Unalterably Closed Mind" Standard Will Be Applied to That Great Majority of Administrative Rulemaking Proceedings Which Have Fewer Statutory Safeguards Than Section 18

Over the past forty years Congress has delegated increasing authority to federal administrative agencies. During this period, and in the past decade in particular, the administrative agencies have come to exercise their delegated authority more and more frequently through the promulgation of rules of general applicability, rather than through case-by-case adjudication.

> "The multiplication of rulemaking during the 1970's is in such volume that predictions that rulemaking will become the mainstay for carrying out government programs are no longer appropriate. Such predictions have already come true. Rulemaking is *now* the mainstay. And the prospects are that it will continue to increase." 1 K. Davis, *Administrative Law Treatise*, § 1:9 at 34 (2d ed. 1978); emphasis in original.

The decision of the court below, if not reversed, will apply to the great majority of rulemaking proceedings currently undertaken by federal agencies. The broad application of the "unalterably closed mind" standard will insulate virtually all administrative officials, not just FTC Commissioners, from disqualification for prejudgment of factual issues in rulemaking proceedings.

The Administrative Procedure Act provides two models for rulemaking: informal, notice and comment proceedings under Section 4 (5 U.S.C. § 553), and formal, on the record

proceedings under Sections 7 and 8 (5 U.S.C. §§ 556, 557). In recent years, use of formal rulemaking procedures has decreased dramatically. At the same time, Congress has enacted a number of "hybrid" rulemaking statutes for particular agencies,[9] employing aspects of both "informal" and "formal" rulemaking. Of these hybrid statutes, only two—Section 18 of the FTC Act and Section 6 of the Toxic Substance Control Act (15 U.S.C. § 2605)—provide for both cross-examination and substantial evidence review. If the "unalterably closed mind" standard is applied to Section 18 proceedings, then that same disqualification standard must apply to all rulemaking proceedings with less comprehensive statutory guarantees. In short, if unreviewed, the "unalterably closed mind" standard will apply to all rulemaking proceedings short of formal rulemaking.[10]

B. If the Evidence Against Chairman Pertschuk is Insufficient to Meet the "Unalterably Closed Mind" Prejudgment Standard, Then it Is Difficult to Imagine How Any Administrative Official Could Ever Be Disqualified From a Rulemaking Proceeding on the Grounds of Prejudgment

Often it is difficult to predict what effect a particular standard or rule will have in practice merely by examining it on its face. The majority of the court below, however,

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[9]Besides Section 18 of the FTC Act, *see, e.g.*, Consumer Product Safety Act § 9, 15 U.S.C. § 2058 (1976); Toxic Substances Control Act § 6, 15 U.S.C. § 2605 (1976); Occupational Safety and Health Act of 1970, § 6, 29 U.S.C. § 665 (1976); Department of Energy Organization Act § 501, 42 U.S.C. § 7191 (Supp. I 1977); Clean Air Act Amendments of 1977, § 305, 42 U.S.C. § 7607 (Supp. I 1977).

[10]In fact, it may apply to formal rulemaking, too. That application was proposed by the seven independent regulatory agencies who filed a joint brief with the Court of Appeals, as amici curiae. See footnote 3, *supra;* Amici's Brief at 14. The reasoning of Judge Tamm's opinion—that the *Cinderella* standard should not be applied in proceedings designed to consider rules of general applicability—would suggest the same result.

has provided an excellent opportunity to see the actual contours of the "unalterably closed mind" standard by applying it to this case. The majority's application of that standard to excuse Chairman Pertschuk's conduct in the Children's Advertising proceeding is a stark confirmation of Judge MacKinnon's view "that evidence of bias and prejudice would not be disqualifying unless it could surmount a fence that is horse high, pig tight and bull strong." (App. at A77.) The majority opinion, if unreversed, will build such a fence to surround virtually all rulemaking proceedings conducted by federal agencies.

The facts of this case are set forth above and in Section IV of Judge MacKinnon's dissent (App. at A77-A87). They need not be recounted in depth here. Suffice it to say that the Chairman has repeatedly referred to children's television advertising as "evil" and "unfair". He has flatly stated that advertisers "exploit" and "manipulate" children, treating them as "commercial objects", and has expressed concern about the "moral myopia" that allows such practices to continue. Finally, the Chairman, in his letter to Food and Drug Commissioner Donald Kennedy, stated the "conviction" that "children's advertising is inherently unfair".

The District Court described the Chairman's statements and letters as consisting of "conclusory statements of fact" and "emotional use of derogatory terms and characterizations", indicating "his affirmative efforts to propagate his settled views. . . ." (App. at B4.) Judge MacKinnon concluded that the Chairman was "a vigorous public advocate 'committed' to curing the 'evils' and 'moral myopia" evident in the 'exploitation' of children's advertising on TV". (App. at A99). Professor Antonin Scalia, former Chairman of the Administrative Conference of the United States, has observed that "it is admittedly difficult to recall so vigorous an expression of prejudgment in a pending proceeding."

Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup.Ct.Rev. 345, 408 n. 255. However, the majority of the court below saw the Chairman's remarks, considered as a whole, as merely "discussion, and perhaps advocacy, of the legal theory that might support exercise of the Commission's jurisdiction over children's advertising." (App. at A41.)

Thus, under the majority's standard, it is clear that an administrative official can only be disqualified from a rulemaking proceeding for prejudgment if he or she expressly states, "Nothing will change my mind."[11] In reality, the majority has completely written prejudgment disqualification out of federal administrative rulemaking proceedings. The decision of the court below is fundamentally at odds with basic notions of Constitutional due process and fairness. This Court should grant petitioners' request and issue a writ of certiorari to review the decision below.

STATEMENT OF FACTS AND LAW REGARDING MOOTNESS

Shortly after judgment was entered by the court below, an additional development occurred which might lead respondents to argue that this case is moot.[12] On January 7, 1980, eleven days after judgment was entered by the Court

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[11]Although it appears that Chairman Pertschuk has in fact met even this test. "Conviction" is defined as "the state of being convinced; a fixed or firm belief." "Inherent" is defined as "existing in something as a permanent and inseparable element, quality or attribute". The Random House Dictionary of the English Language, Unabridged Edition (1966). Both words appear prominently in the Chairman's statements on children's advertising.

[12]While petitioners conclude that the subsequent development does not render this case moot, and will set forth the basis for that conclusion in this section, the question of mootness is a jurisdictional question. *United States v. Alaska S. S. Co.*, 253 U.S. 113 (1920). As such, petitioners recognize their duty to bring the mootness question before this Court. *See Fusari v. Steinberg*, 419 U.S. 379, 390-391 (1975) (Burger, C.J., concurring).

of Appeals and almost twenty months after he was first requested to step down, Chairman Pertschuk recused himself from the Children's Advertising proceeding. In a statement prepared as a press release (Appendix F), the Chairman lauded the Court of Appeals decision as confirming "the lawfulness and appropriateness of my participation in this proceeding." (App. at F2.) He reasserted the position he had taken throughout the litigation. "I declined [to recuse myself] because I knew I could and would decide the issues involved fairly and objectively based upon the record." (*Id.*) However, he voluntarily ceased his participation in the Children's Advertising proceeding, ostensibly to insure that the current Congressional debate on the propriety of the Children's Advertising proceeding itself would not focus on "a diversionary issue"—the Chairman's participation in those proceedings. (App. at F3.)

Petitioners submit that Chairman Pertschuk's voluntary recusal from the Children's Advertising proceeding does not deprive this Court of jurisdiction to hear this case. The Chairman's recusal, coming within two weeks after he received a favorable opinion from a divided panel of the court below, is a classic example of a well-recognized exception to the mootness doctrine—the "voluntary cessation of allegedly illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953).

The rationale behind the development of the "voluntary cessation" exception is clear. This Court has long recognized that if a party to litigation could shield itself from judicial review by unilaterally suspending its challenged conduct while continuing to assert the legality of that conduct, individual parties could easily gain undue control over the judiciary's power to resolve controversies. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

Thus, this Court has not permitted a sole party to insulate its conduct from judicial review by merely ceasing that conduct when review is imminent. The principle is best illustrated by the leading case in this area, *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), a case in which the actions of the defendants closely approximate those of Chairman Pertschuk. In *W. T. Grant*, after five years of administrative effort, the government brought suit to enjoin one Hancock from sitting on the boards of directors of corporations who were substantial competitors with one another. Soon after the complaints were filed against Hancock and the corporations, Hancock resigned from certain of the boards, which alleviated the allegedly illegal conduct. Defendants refused to acknowledge the illegality of their conduct; however, they disclaimed any intention of reviving the interlocking directorates. This Court held that Hancock's resignations did not moot the case.

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot . . . A controversy may remain to be settled in such circumstances, . . . *e.g.*, a dispute over the legality of the challenged practices. . . . *The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.* For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.
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> "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one. *Here the defendants told the court that the interlocks no longer existed and disclaimed any*

> *intention to revive them. Such a profession does not suffice to make a case moot* although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts. *Id.* at 632-33; citations and footnotes omitted; emphasis added.

The principle enunciated in *W. T. Grant* applies directly to the present case. Chairman Pertschuk was first requested to recuse himself from the Children's Advertising proceeding in May of 1978. On July 13, 1978, he refused to recuse himself, claiming that he could consider the issues raised in the proceeding impartially. Eighteen months later, after vigorous litigation in the District Court and the Court of Appeals, the Chairman reversed his decision of July 13, 1978, and withdrew from the proceeding. In the press release announcing his withdrawal, the Chairman indicated that his change of position was taken "in the best interest of the FTC generally and the Children's Advertising proceeding in particular" (App. at F2), and was prompted by the controversy in Congress surrounding the Commission's activities. There was no indication that his recusal was influenced in any way by a reassessment of the propriety of his continued participation in the Children's Advertising proceeding; in fact, the Chairman forcefully reasserted the legality of his continued participation.

Petitioners do not know whether the Chairman will assert that his action has mooted the decision below. However, if the Chairman adopts such a position, this Court cannot allow such brazen maneuvering to undermine its jurisdiction. Obviously, the Chairman's recusal was prompted by more than just his concern over the Congressional debates about the FTC. Those debates were just as heated eleven days before the Court of Appeals decision as they were eleven days after. If his recusal were allowed to moot this controversy, there is no statutory or regula-

tory provision that would expressly prohibit Chairman Pertschuk from resuming participation if he subsequently found it "in the best interest of the FTC generally and the Children's Advertising proceeding in particular."[13] In short, the Chairman has left open much more of a reasonable expectation that he will "return to his old ways" than did the defendants in *W. T. Grant.* The Chairman's current recusal, if it has any bearing at all, relates only to the injunctive relief sought and received by petitioners in the District Court, not to the declaratory judgment rendered by the District Court. Nor is this case in any way affected by the fact that it is the government's unilateral activity which is in question, *see Gray v. Sanders*, 372 U.S. 368, 375-76 (1963); *Quern v. Mandley*, 436 U.S. 725, 733, n. 7 (1978), nor that the Chairman withdrew after receiving a favorable opinion, *United States v. Trans-Missouri Freight Association, supra,* 166 U.S. 290 (1897). In this case of great importance to all those subject to the federal regulatory process, petitioners respectfully submit that the consideration of this Court should not be frustrated by political jockeying.[14]

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[13]E.g., if the vagaries of political sentiment improved the relationship between the Commission and Congress, or if the Children's Advertising proceeding again became stalled, as it has once before, by the lack of three qualified Commissioners besides the Chairman.

[14]In the event this Court does find the Chairman's recusal sufficient to render the case moot, petitioners respectfully request that this Court vacate the judgment of the Court of Appeals and remand the case to that court for entry of an order directing the District Court to dismiss the action as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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